Supreme Court, U. S.
FILED
SEP 10 1976
MICHAEL RODAK, JR., CLERK

No. 75-811

In the Supreme Court of the United States

OCTOBER TERM, 1976

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL.,
PETITIONERS

v.

ROOSEVELT F. PALMORE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO VACATE AND REMAND

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners move that the judgment of the court of appeals in *Palmore* be vacated and that the case be remanded to that court for further consideration in light of *Stone* v. *Powell,* No. 74-1055, decided July 6, 1976.

On February 23, 1976, this Court granted the government's petition in No. 75-811 for writs of certiorari to review two separate *en banc* judgments of the court of appeals, one in *Palmore* and the other in *Pressley.* The petition presented a single question: "Whether the federal district courts have jurisdiction to entertain habeas corpus petitions by persons convicted of violations of the District of Columbia Code in the Superior Court of the District of Columbia." Respondents Palmore and Pressley had each filed a post-conviction application for a writ of habeas corpus in the United States District

Court for the District of Columbia, challenging his criminal sentence imposed by the Superior Court of the District of Columbia.

Palmore's application raised a Fourth Amendment issue. He contended that a pistol seized from the car in which he was driving when stopped by the police should not have been admitted in evidence at his trial because it was discovered as a result of an allegedly unlawful search.[1] Palmore's Fourth Amendment contention had been considered and rejected both by the trial court and on appeal by the District of Columbia Court of Appeals (290 A. 2d 573). This Court had thereafter denied certiorari with respect to that issue (411 U.S. 389, 396-397 and n. 6).

In the federal habeas corpus proceeding, the district court dismissed Palmore's application on jurisdictional grounds, but the court of appeals reversed and remanded for a decision on the merits of Palmore's Fourth Amendment contentions. The court of appeals' jurisdictional holding rested in large part on its view that the District of Columbia court system under the Court Reform Act should be viewed as "analogous to the relationship between the federal and state courts" (Pet. App. 33a).

After the petition for certiorari was granted with respect to both *Palmore* and *Pressley*, this Court decided *Stone* v. *Powell*, *supra*, which held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconsti-

[1]Pressley's habeas corpus application raised a Sixth Amendment issue, alleging that he had been denied the effective assistance of counsel.

tutional search or seizure was introduced at his trial" (slip op. 27; footnote omitted). In our view, the rationale of that holding applies with full force in *Palmore*. If we are correct, Palmore would be entitled to no habeas corpus relief in the United States District Court on his Fourth Amendment claim even if the court of appeals' jurisdictional holding were to be affirmed by this Court.

In these circumstances, we believe that it would be appropriate to vacate the judgment of the court of appeals in *Palmore* and remand the case to that court so that it may consider in the first instance what bearing *Stone* v. *Powell* has on the proper disposition of Palmore's habeas corpus application. The granting of this motion would not affect the status of the *Pressley* case, in which certiorari was concurrently granted and in which the question presented by the petition remains alive and potentially dispositive.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.